

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION**

CATHERINE ALEXANDER,)	
)	
Plaintiff,)	
)	
-vs-)	
)	
TAKE-TWO INTERACTIVE SOFTWARE, INC.,)	
2K GAMES, INC.; 2K SPORTS, INC.; WORLD)	CASE NO. 3:18-CV-966-SMY-MAB
WRESTLING ENTERTAINMENT, INC.;)	
VISUAL CONCEPTS ENTERTAINMENT;)	
YUKE’S CO., LTD.; AND YUKE’S LA, INC.,)	
)	
)	
Defendants.)	

**DEFENDANTS’ RESPONSE TO PLAINTIFF’S NOTICE OF
SUPPLEMENTAL AUTHORITY**

Defendants file this response to Plaintiff’s Notice of Supplemental Authority (Dkt-319) concerning *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).¹

Goldsmith concerns the application of fair use factor one, the purpose and character of the use, to AWF’s use of Goldsmith’s photograph of the musician Prince in an Andy Warhol artwork titled “Orange Prince.” AWF licensed “Orange Prince” for use on a magazine cover commemorating Prince without Goldsmith’s permission. The Supreme Court held that the parties’ respective uses of “Orange Prince” “share substantially the same purpose” because Goldsmith had licensed the photograph to illustrate stories about Prince, including in connection with Orange Prince’s first magazine appearance. *Id.* at 1280. AWF’s use was thus substitutive, “supersede[ing]

¹ Local Rule 7.1 incorporates Federal Rule of Appellate Procedure 28(j), which permits this response.

the objects” of the original, which weighed against fair use. *Id.* at 1274.

Warhol supports Defendants’ Motion for JMOL on fair use. Dkt-313. **First**, the Parties’ purposes are **different**. Courts have recognized that showing an artistic work to accurately represent reality is different from the original expressive purpose of the work. Dkt-313 at 6. *Warhol* did not change this precedent. The record establishes that Defendants’ purpose was accuracy, which is different from Plaintiff’s purpose. *Id.* at 6-7. This fact continues to favor fair use.

Second, *WWE 2K* is **not a substitute** for the Tattoos. *Warhol* is consistent with the Seventh Circuit’s focus on substitution in *Kienitz v. Sconnie Nation* and does not change that law. 766 F.3d 756, 758 (7th Cir. 2014). Plaintiff does not license tattoos in video games or compete with Defendants, and no customer would purchase *WWE 2K* instead of a tattoo. Dkt-313 at 5. This fact continues to favor fair use.

Goldsmith affirmed a finding that factor one favored the plaintiff at summary judgment. This is consistent with *Google LLC v. Oracle Am., Inc.* which found that fair use is a legal question for the court. 141 S.Ct. at 119. Based on the admitted and undisputed facts, *Goldsmith* supports a finding that Defendants are entitled to JMOL on fair use.

Dated: August 18, 2022

Respectfully submitted,

/s/ Dale M. Cendali

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023, I electronically filed the foregoing Defendants' Response to Plaintiff's Notice of Supplemental Authority with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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